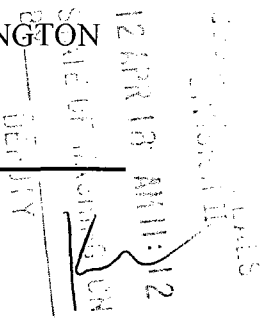
NO. 42010-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO



STATE OF WASHINGTON,

Respondent,

v.

JOHN DAVID WILES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Linda CJ Lee

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. REVERSAL IS REQUIRED BECAUSE WILES WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE DEFENSE COUNSEL'S PERFORMANCE WAS DEFICIENT IN FAILING TO REQUEST A VOLUNTARY INTOXICATION INTRUCTION WHERE THE EVIDENCE SUPPORTED AN INSTRUCTION AND WILES WAS PREJUDICED BY COUNSEL'S DEFICIENT PERFORMANCE.

The State argues that Wiles was not entitled to an instruction on voluntary intoxication primarily relying on State v. Gabryschak, 83 Wn. App. 249, 921 P.2d 549 (1996). Brief of Respondent at 5-11. The State's argument fails because Gabryschak is clearly distinguishable. Gabryschak was convicted of felony harassment and third degree malicious mischief and argued on appeal that the trial court erred in denying his request for a voluntary intoxication instruction. 83 Wn. App. at 250. Two officers and another witness for the State had testified that Gabryschak was intoxicated. Gabryschak did not testify and did not call any witnesses. Id. at 253.

Division One of this Court pointed out that the evidence showed that Gabryschak responded and understood the officers' requests, tried to run which indicated that he knew he was under arrest, he spoke with conviction when he threatened one of the officers, and he did not stumble or appear confused or disoriented. Id. at 254-55. The Court held that a

rational juror could not logically and reasonably conclude that "his intoxication affected his ability to think and act in accord with the requisite mental states - with knowledge in the case of the felony harassment charge, and with malice in the case of the malicious mischief charge." Id. at 255. Significantly, the Court noted that if Gabryschak had presented affirmative evidence, it may have been more effective. Id. at 253.

In contrast, Wiles presented affirmative evidence by testifying in his defense. 4RP 183-201. He admitted that he has a drinking problem because he is an alcoholic. 4RP 189. He recalled that on the day of the incident, he went to a bar and drank to the point of blacking out. 4RP 195, 198-201. The next thing he remembered was waking up in Ikuscheghan's garage to the sound of a police bullhorn. 4RP 199-201. He could not recall going to her house. 4RP 194, 200-01. Unlike Gabryschak, the record reflects that Wiles did not attempt to resist arrest and he appeared confused and disoriented. Officer Tiffany testified that after they used a PA system to order Wiles to come out, he came out of the garage "kind of stumbling, hands up in the air. He appeared confused. Didn't really seem to know what was going on." 3RP 111. The officers directed Wiles to come through the gate into the alley where they were waiting but he could not find his way through the gate, "The subject had trouble -- I don't know

if he was trying to open the gate or whatever, but he just kind of leaned up against the gate with his hands over the fence." 3RP 111. Furthermore, Officer Williams testified that he saw "numerous empty beer cans" when he inspected the garage after Wiles was arrested. 3RP 102.

A person can be so intoxicated as to be unconscious. State v. Coates, 107 Wn.2d 882, 891, 735 P.2d 64 (1987). In determining whether a jury instruction should be given, evidence in support of the instruction is assumed to be true. State v. Rio, 38 Wn.2d 446, 454-55, 230 P.2d 308 (1951). Wiles was entitled to the involuntary intoxication instruction because when viewing the evidence in the light most favorable to Wiles, a jury could have reasonably found that Wiles was too intoxicated to knowingly violate the court order. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

The State argues further that defense counsel was not ineffective in failing to request an instruction on voluntary intoxication mistakenly relying on State v. Cienfuegos, 144 Wn.2d 222, 25 P.3d 1011 (2001). Brief of Respondent at 11-18. Cienfuegos argued on appeal that he was denied his right to effective assistance of counsel because defense counsel did not request a diminished capacity instruction. 144 Wn.2d at 227. The Supreme Court held that defense counsel was not ineffective because the jury was instructed on the relevant mental states of knowledge and intent

and defense counsel was able to adequately argue his theory of the case without the diminished capacity instruction. Id. at 229-30.

Cienfuegos has no application here where defense counsel failed to request an involuntary intoxication instruction and never argued that Wiles' intoxication prevented him from forming the requisite mental state of knowledge. The State claims that defense counsel made a tactical decision not to use the involuntary intoxication defense. Brief of Respondent at 13-15. To the contrary, it was defense counsel who asked Wiles during direct examination if he had a "drinking problem" and Wiles replied, "I'm an alcoholic. Yes, sir." 4RP 189. Defense counsel's questioning also drew a response from Wiles that the first thing he remembered about the day of the incident was that he started drinking. 4RP 195. Based on defense counsel's line of questioning, the State cross-examined Wiles extensively about blacking out after going to the bar. 4RP 198-201.

Contrary to the State's argument, the record substantiates that the evidence developed by defense counsel supported an instruction on involuntary intoxication and counsel was ineffective for failing to request an instruction which consequently prejudiced Wiles' defense. See Brief of Appellant at 5-11.

2. A REMAND FOR RESENTENCING IS REQUIRED BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO CONSIDER WILES' MOTION FOR ARREST OF JUDGMENT AT SENTENCING.

The State argues that the trial court did not abuse its discretion in refusing to hear Wiles' pro se motions to arrest judgment, citing State v. Hightower, 36 Wn. App. 536, 676 P.2d 1016 (1984). Brief of Respondent at 18-21. The State's reliance on Hightower is misguided. In Hightower, Division One of this Court determined that a defendant is not entitled "to participate as co-counsel at trial or, as it is known, to have hybrid representation." 36 Wn. App. at 540. The Court concluded that "a defendant has no constitutional right to proceed to trial with counsel and to simultaneously actively conduct his own defense." Id. at 541. Accordingly, the Court held that the trial court did not abuse its discretion in denying Hightower's motion to act as co-counsel in the case. Id. at 543.

Hightower has no application here where Wiles did not move to act as co-counsel in his trial. As the record reflects, Wiles moved for an arrest of judgment at sentencing. 6RP 243-46; CP 89-94. Without addressing Wiles at all, the trial court abruptly concluded that it would not consider his motions "as he is represented by counsel and counsel has filed a brief on the motion for arrest of judgment." 6RP 246. Contrary to the State's unsupported assertion, RCW 9.94A.500 is not limited to allocution.

The statute provides that the trial court shall allow argument from the offender.

By refusing to hear Wiles' motions which were based on different grounds, the court violated his constitutional and statutory right to be heard at sentencing requiring a remand for resentencing. See Brief of Appellant at 11-12.

B. CONCLUSION

For the reasons stated here and in appellant's opening brief, this Court should reverse Mr. Wiles' conviction, or in the alternative, remand for resentencing.

DATED this 16th day of April, 2012.

Respectfully submitted,

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DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Jason Ruyf, Pierce County Prosecutor's Office 930 Tacoma Avenue South, Tacoma, Washington 98032.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 16th day of April, 2012 in Kent, Washington.

Valerie Marushige

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